"The case is presented on the pleadings. Whether there is a cause of action under Section 7 of the Anti-Trust Act, is the sole question for decision. Keogh contends that his rights are not limited to the protection against unreasonably high or discriminatory rates afforded him by the act to regulate commerce; that under the Anti-Trust Act he was entitled to the benefit of competitive rates; that the elimination of competition caused the increase in his rates and he has been damaged thereby and he is entitled to recover."

This court simply held in the Keogh case that under the Interstate Commerce Act a shipper is only entitled to just and reasonable rates. The petitioner in the present case stands before this Court asking for the enforcement of this right.

On page 65 of respondents' brief the case of *Winsor Coal Co. v. C. & A. R. Co.*, 52 Fed. 719, is cited as an authority sustaining their position. The opinion in that case sustains the argument advanced by petitioners; for it clearly points out that the Missouri Railroad Commission had placed upon it the specific duty to see that all rates were just and reasonable, as shown by the following excerpt:

"It shall be the duty of the railroad commissioners to see that all schedules of rates adopted by common carriers are reasonable and just.

"Throughout the entire act it is clear that it was the legislative mind to impose upon the chosen agents of the state—the railroad commissioners—the duty of supervising and regulating the rates charged by such carriers and to ascertain and declare from time to time as the changing conditions of trade and commerce might suggest what as between shipper and carrier is a reasonable and just rate of compensation.

"In the absence of any affirmative action by the commissioners the intendment of law, arising from the legal presumption that public officers performed their duties, should be that no complaint had arisen of unjust charges or that the commissioners, who are presumed to be in possession of the schedule adopted by the carrier, deem the maximum fixed by the carrier and the legislator to be reasonable and just." *Winsor Coal Co. v. C. & A. R. Co.*, 52 Fed. 716, 719, 720.

No such duty is placed upon the Interstate Commerce Commission by the Federal act. This duty is placed entirely upon the carriers. The respondents have attempted to read into the Federal act the provisions which were specifically set forth in the Missouri act.

Among the cases cited by appellees is that of Northern Pacific v. Department of Public Works in the State of Washington, 136 Wash. 389 (240 Pac. 362) discussed at pages 66 to 71 of brief for appellees. There are some considerations affecting this decision which are not set forth in the brief for appellees. For example, Section 10393 of the Revised Statutes of Washington provides that the Department (being the regulatory commission) may "establish and fix a joint rate which will be fair, just, reasonable and sufficient" to be charged in the future.

Article 10422 deals with complaints and the authority of the Commission with respect thereto. It provides that after complaints have been filed or upon the complaint of the Commission upon its own motion, "the Commission shall have power, after notice and hearing as in other cases, to, by its order,

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. [redacted] 98

Office Supreme Court,
FILED
JUN 24 19
CHARLES

ARIZONA GROCERY COMPANY,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.,
Respondents.

ARIZONA GROCERY COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY ET AL.,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari.

A. B. BAKER,
L. B. WHITNEY,
L. H. CHALMERS,
H. M. FENNEMORE,
THOMAS G. NAIRN,
Phoenix, Arizona,
E. W. CAMP,
Los Angeles, California,
JAMES E. LYONS,
San Francisco, California.
Attorneys for Respondents.

R. S. OUTLAW,
GERALD E. DUFFY,
BURTON MASON,
Of Counsel.

Index

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	6
I. The decision of the Circuit Court of Appeals is not erroneous in the respects asserted by the petitioner, or otherwise	7
1. The Circuit Court has correctly concluded that the rates and charges applied upon petitioner's shipments, having been in conformity with the Commission's order in the First Case, were conclusively established as just and reasonable; and that the respondents, in maintaining and applying such rates, fulfilled their duty under the Interstate Commerce Act to maintain and apply just and reasonable rates and charges	7
2. The Circuit Court of Appeals correctly concluded that the Act does not confer upon the Commission jurisdiction to award reparation for the collection of rates lawfully published in compliance with the Commission's prior formal findings and orders	13
3. The Circuit Court of Appeals has correctly concluded that if the Act were to be construed as conferring jurisdiction upon the Commission to award reparation against commission-made rates, it would to that extent be unconstitutional and void, in that it would operate to deprive the respondent carriers of property without due process of law	18
II. While this Court has never directly decided the precise question of federal law here involved, it has done so indirectly in a number of cases. The Circuit Court's decision is squarely in accord with the controlling pronouncements of this Court	21

Page

III. The decision of the Circuit Court does not deny petitioner any property right, or its property without due process of law 26

IV. While the issue involved in the case at bar is of considerable importance, there is no necessity for any further pronouncement by this Court with respect thereto 29

CONCLUSION 31

Table of Cases Cited.

	Pages
A. C. L. R. Co. v. Powe, 75 L. ed. Adv. Ops. 721	17
Ann Arbor R. R. Co. v. U. S., 281 U. S. 658, 668	10, 18
A. T. & S. F. Ry. Co. v. United States, 234 U. S. 294, 311	13
A. T. & S. F. Ry. Co. v. United States, 232 U. S. 199, 221	10
Baer Bros. v. D. & R. G. R. Co., 233 U S. 479, 486	19
Blodgett v. Holden, 275 U. S. 142	20
Bonfils v. Public Utilities Comm., 67 Colo. 563	17
Calder v. Bull, 3 Dallas (3 U. S.) 385	20
C. R. I. & P. Ry. Co. v. U. S., 274 U. S. 29	11
Fletcher v. Peck, 6 Cranch (10 U. S.) 87, 135	20,
Harriman v. I. C. C., 211 U. S. 407, 422	18
Hurtado v. California, 110 U. S. 516, 535	20
I. C. Act, Secs. 8, 9, 16(1) (49 U. S. Code 8, 9, 16(1))	15
I. C. C. v. Diffenbaugh, 222 U. S. 42, 47	10
I. C. C. v. U. P. R. R. Co., 222 U. S. 541, 547	12
Keogh v. C. & N. W. Ry. Co., 260 U. S. 156	16, 21
L. & N. R. Co. v. Garrett, 231 U. S. 298, 305	19
Mathieson Alkali Works v. N. & W. Ry. Co., 147 Va. 426; 137 S. W. 608	17
Mellon v. World Publishing Co., 20 Fed. (2d) 613	11
Miller Mill Co. v. L. & N. R. Co., 207 Ala. 253	17
Miller, Legislative Evolution of Interstate Commerce Act, pp. 138-140	11
M. K. & T. Ry. Co. v. Railroad Comm. of Tex., 3 S. W. (2d) 489; 13 S. W. (2d) 680	17
M. K. & T. Ry. Co. v. I. C. C., 164 Fed. 645, 648	10
Mitchell Coal Co. v. Pa. Ry. Co., 230 U. S. 247, 259	25
Montrose Oil Refining Co. v. St. L.-S. F. Ry. Co. et al., 25 Fed. (2d) 750	11

	Page
News Syndicate Co. v. N. Y. C. R. Co., 275 U. S. 179, 187	15
N. P. Ry. Co. v. Depart. of Public Works, 136 Wash. 389	17
Philips v. Grand Trunk Western Ry. Co., 236 U. S. 662, 665	25
Prentis v. A. C. L. R. Co., 211 U. S. 210, 226	15
Reagan v. Farmers Loan & Trust Co. (1894), 154 U. S. 362	23
Scott v. McNeil, 154 U. S. 34	28
Skinner & Eddy Co. v. United States, 249 U. S. 557, 562	25
S. P. Co. v. I. C. C., 219 U. S. 433, 443	10, 21, 22
34 *Stat.* 589 (Hepburn Act of June 30, 1906, Sect. 4)	11
36 *Stat.* 551 (Mann-Elkins Act of June 18, 1910, Sect. 12)	11
41 *Stat.* 484 (Transportation Act of Feb. 28, 1920, Sect. 418	11
T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 448	25
T. & P. Ry. Co. v. Railroad Comm., 137 La. 1059	17
Traffic Bureau, Phoenix Chamber of Commerce v. Director General, et al., 62 I. C. C. 412	2, 11, 12
Traffic Bureau, Phoenix Chamber of Commerce v. A. T. & S. F. Ry. Co., 95 I. C. C. 244	3, 11
Traffic Bureau, Phoenix Chamber of Commerce v. A. T. & S. F. Ry. Co. et al., 140 I. C. C. 171	4, 11, 12
Twining v. New Jersey, 211 U. S. 78, 101	20
U. S. v. N. Y. C. R. Co., 263 U. S. 603, 610	10
United States v. Mo. Pac. R. R. Co., 278 U. S. 269	30
Untermyer v. Anderson, 276 U. S. 440	20
Valley v. No. F. & M. Ins. Co., 254 U. S. 348	28
Virginian R. Co. v. U. S., 272 U. S. 658, 665	13
Webster v. Fall, 266 U. S. 507	25
Western Paper Makers' Chemical Co. v. U. S., 271 U. S. 268, 271	12
Winsor Coal Co. v. C. & A. R. Co., 52 Fed. 716	17
Wolff Co. v. Industrial Court, 267 U. S. 552	25
Young Co. v. Payne, 127 Miss. 48	17

In the Supreme Court
OF THE
United States

October Term, 1930

No. 983

Arizona Grocery Company,
Petitioner,
vs.
The Atchison, Topeka & Santa Fe Railway Company et al.,
Respondents.

Arizona Grocery Company,
Petitioner,
vs.
Southern Pacific Company et al.,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari.

Preliminary Statement.

The essential issue here presented is whether the Interstate Commerce Commission is empowered, by

the Interstate Commerce Act, to make a valid order awarding reparation (i. e., damages), on account of the collection, by carriers subject to the Act, of rates equal to or less than those which the Commission has itself directly prescribed or approved, by a prior formal valid continuing order. The Circuit Court of Appeals for the Ninth Circuit has declared, in the decision (48 Fed. (2) .....; R. 438-462) which petitioner seeks to have reviewed, that the Commission has no such power, and that a purported order for the payment of reparation, made under such circumstances, is void and of no effect.

Statement of the Case.

The summary of the facts which appears in petitioner's statement of the case (Petition, pp. 2-4) is neither complete nor wholly accurate. The essential facts are, however, set forth quite fully in the Circuit Court's opinion (R., 438-453). Briefly summarized, they are as follows:

On June 22, 1921, in response to a complaint filed by various shippers (including petitioner's predecessor), the Interstate Commerce Commission rendered its decision entitled

Traffic Bureau, Phoenix Chamber of Commerce v. Director General, et al., 62 I. C. C. 412.

In that decision (hereinafter referred to as the *First Case*) the Commission found that, for the fu-

ture, reasonable rates on sugar, in carloads, from all points in California to Phoenix, Arizona, should not exceed 96½ cents.[1] The defendant carriers were ordered to establish, on or before September 17, 1921, and thereafter to maintain until the Commission's further order, rates not exceeding the figure named. A copy of the Commission's opinion and order is embodied in the Record (R., 223-275). The carriers complied with the order in the *First Case* by establishing (September 17, 1921) a rate of 96 cents. That rate was afterwards twice voluntarily reduced: first to 86½ cents (July 1, 1922), and later to 84 cents (January 10, 1924).

On January 6, 1925, in response to a complaint filed on November 3, 1922, by various shippers (not including petitioner), the Commission rendered its decision in the so-called *Second Case:*

> *Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co.*, 95 I. C. C. 244.

In that decision the Commission found that the rate of 84 cents then in effect on sugar from California points to Phoenix was, and in future would be, unreasonable, and ordered rates not exceeding 71 cents to be established effective February 25, 1925. The opinion and order in the *Second Case* are reproduced in the transcript (R., 276-290). The order was duly complied with, the 71-cent rate becoming effective on the date mentioned.

(1) All rates herein are stated in amounts per 100 pounds.

The Commission also undertook to *find,* in the *Second Case,* that reparation was due upon shipments of sugar moving prior to the effective date of its order, and during the period when the order in the *First Case* was still in effect; but no *order* for the payment of reparation was actually made. The *Second Case* was subsequently reopened, and consolidated with a number of other cases in which rates on sugar to Phoenix and other Arizona points were under attack. These consolidated proceedings were decided on March 12, 1928, in the so-called *Third Case:*

> *Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., et al.,* 140 I. C. C. 171.

In that decision the Commission modified its conclusions in the *Second Case* with respect to future rates, by prescribing a rate of 73 cents from Northern California points to Phoenix, instead of the 71-cent rate previously ordered. It did not attempt to make that finding retroactive. It did, however, undertake to find that rates which had been charged in the past, during the period preceding the effective date of the decision in the *Second Case,* and while the order in the *First Case* was still in effect without modification, had been unreasonable, and that petitioner and other shippers, who had made shipments under such rates and paid charges based thereon had been damaged, and were entitled to reparation, to the extent that the charges paid exceeded those which would have accrued under rates retroactively determined, by the findings in the

Third Case, to have been unreasonable. The opinion and order in the *Third Case* are likewise reproduced in the transcript (R., 290-309). Petitioner subsequently filed statements showing shipments which it had made, the rates assessed, the charges collected, and the amounts claimed as reparation under the findings in the *Third Case*. Thereupon the Commission issued its formal order (March 11, 1929), directing respondents to pay such reparation (R., 46-47).

All of the shipments as to which reparation was awarded moved during the period between February 1, 1923, and February 10, 1925. The charges thereon were based upon the rates of 86½ cents and 84 cents, successively in effect during that period, maintained by respondents in compliance with the order in the *First Case*, then outstanding and unmodified.

Respondents declined to comply with the reparation order of March 11, 1929; and petitioner thereafter brought two suits in the United States District Court for Arizona. These suits were consolidated, and submitted upon an agreed statement of facts (R., 254-319), to the trial court sitting without a jury. That court ruled that the reparation order sued upon was valid, overruling the opposing contention of the defendant carriers, and after making special findings of fact and conclusions of law (R., 355-375), rendered judgments for petitioner (R., 228-230). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgments were reversed (R., 463-464),

that Court having concluded, as before stated, that the Commission's reparation order was void and of no effect.

Argument.

INTRODUCTORY.

The rules of this Court provide (Rule 38, par. 5-b) that a writ of certiorari to review a decision of a Circuit Court of Appeals will, in general, be granted only when at least one of six specified reasons is made to appear. Petitioner relies upon two of these only, viz.:

(i) That the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; and

(ii) That the Circuit Court has decided a federal question in a way *probably* in conflict with applicable decisions of this Court.

Petitioner does not assert that the decision sought to be reviewed conflicts with any decision of another Circuit Court of Appeals, or that the Circuit Court has decided an important general legal question in a way which is untenable, or in conflict with the weight of authority. Moreover, the reasons urged are essentially inconsistent and self-contradictory. Obviously, if the question has not been settled, the Circuit Court's decision cannot be in conflict with any applicable decision of this Court.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT ERRONEOUS IN THE RESPECTS ASSERTED BY THE PETITIONER OR OTHERWISE.

Under the heading "Specifications of Error" (Petition, pp. 12-13), it is asserted that the decision of the Circuit Court is erroneous in various respects. Petitioner makes no attempt to support these assignments of error by either direct argument or reference to the authorities; it does not even undertake to associate the several assignments with any specified statements or conclusions set forth in the opinion of the Circuit Court. Petitioner has thus failed to conform to the requirements of Rule 27 of the rules of this Court, and its assignments of error should receive no consideration. Nevertheless, we believe it to be desirable to show, by reference to the opinion and the relevant authorities, that the Circuit Court has not erred, either as asserted by petitioner or otherwise.

---

1. THE CIRCUIT COURT HAS CORRECTLY CONCLUDED THAT THE RATES AND CHARGES APPLIED UPON PETITIONER'S SHIPMENTS, HAVING BEEN IN CONFORMITY WITH THE COMMISSIONS'S ORDER IN THE FIRST CASE, WERE CONCLUSIVELY ESTABLISHED AS JUST AND REASONABLE; AND THAT THE RESPONDENTS, IN MAINTAINING AND APPLYING SUCH RATES, FULFILLED THEIR DUTY UNDER THE INTERSTATE COMMERCE ACT TO MAINTAIN AND APPLY JUST AND REASONABLE RATES AND CHARGES.

Petitioner's Assignments of Error Nos. 5 and 6 are apparently addressed to the Circuit Court's conclu-

sions: (1) that the unchallenged decision and order in the *First Case* constituted a conclusive determination by the Commission of a *reasonable* (not merely a *maximum*) future rate; (2) that respondents, having complied with that valid order during its entire effective period, and maintained and applied their rates in obedience thereto, did not violate the Act, but fulfilled their statutory obligation to maintain and charge reasonable rates upon petitioner's shipments moving during that period; and (3) that consequently the rates charged upon such shipments, and paid by petitioner, were not unreasonable, or otherwise in violation of the Act. It will be noted that petitioner does not contend that the order in the *First Case* was not in full effect, without modification, at the times its shipments moved; likewise, it does not dispute the fact that the rates applied on those shipments conformed to and complied strictly with that order.

The conclusions of the Circuit Court, which petitioner undertakes to challenge by these assignments, are expressed in the following portions (among others) of the opinion:

> "* * * We pause here to say that we are in accord with the apparent conclusion of the Commission that its order fixing a maximum rate was in legal effect a determination by the Commission in its administrative or quasi-legislative capacity of a reasonable and just rate and that the carrier in establishing its tariffs as required by the Commission was justified in fixing its various rates within the maximum thus established and that the order of the Commission amounted to a decision

that rates fixed by the carrier below the maximum it had established were just and reasonable. It would be absurd, it seems to us, to say that the Commission was empowered to prohibit the further collection of a freight rate established by the carrier on the ground that it was unjust and unreasonable and to replace that rate with another rate which was also unjust and unreasonable, that is, not just and not reasonable. * * * Its power in the first place is to declare a rate unreasonable and unjust, and having so declared to replace it with a rate which is reasonable and just". (R., 446-447).

"The whole purpose of the act was to create and compel the enforcement without discrimination of rates which were just and reasonable." (R., 448).

"In view of the history of the legislation and its cardinal purpose it is clear that the maximum rate to be fixed by the Commission must be a reasonable rate. In this connection it should be observed that in the numerous decisions by the courts considering the question of freight rates before the enactment of section 15 in its present form (February 28, 1920, 41 Stat. 484) the court has invariably referred to the administrative power of the Commission as a power to fix rates that are reasonable. No other thought has apparently entered the mind of the judges who are so frequently called upon to pass upon the power of the Commission under the Hepburn Act and the amendments thereto." (R., 450).

"The ascertainment of a maximum rate is in effect a decision that any rate below that maxi-

mum is reasonable as to the shipper, and that the carrier below that maximum can be trusted to fix a rate that is not too low to protect itself." (R., 462).

The conclusions of the Circuit Court, as set forth in the foregoing quotations and elsewhere in the opinion, are directly in accord with, and are sustained by, the following propositions and controlling authorities:

(a) **The primary issue presented, and necessarily decided, in the First Case was whether the rate in effect was unreasonable; and, if so, what a reasonable future rate would be.**

A. T. & S. F. Ry. Co. v. United States, 232 U. S. 199, 221.

(b) **The Commission had no power to prescribe a so-called maximum rate which was not just, reasonable, and otherwise lawful.**

S. P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 443;
I. C. C. v. Diffenbaugh, 222 U. S. 42, 47;
U. S. v. N. Y. C. R. Co., 263 U. S. 603, 610;
Ann Arbor R. R. Co. v. United States, 281 U. S. 658, 668;
M. K. & T. Ry. Co. v. Interstate Commerce Commission, 164 Fed. 645, 648.

A review of the legislative history of those portions of the Act which confer upon the Commission power to prescribe rates for the future will demonstrate that Congress has never contemplated that the Commission should have any power to prescribe a maximum rate

which is not, at the same time, conclusively just and reasonable.

34 Stat. 589 (Hepburn Act of June 30, 1906, Sect. 4);

36 Stat. 551 (Mann-Elkins Act of June 18, 1910, Sec. 12);

41 Stat. 484 (Transportation Act of Feb. 28, 1920, Sect. 418);

Miller, Legislative Evolution of Interstate Commerce Act, pp. 138-140.

(c) Orders of the Commission precisely similar in every essential to the order of the First Case have been held by this Court, and by the Circuit Courts of Appeal, to be orders prescribing reasonable rates.

C. R. I. & P. Ry. Co. v. United States, 274 U. S. 29;

Montrose Oil Refining Co. v. St. L.-S. F. Ry. Co., et al., 25 Fed. (2d) 750;

Mellon v. World Publishing Co., 20 Fed. (2d) 613.

(d) Both in the First Case itself, and upon subsequent review, the Commission has indicated that it regarded its action therein as the prescription of a reasonable rate.

Traffic Bureau, Phoenix Chamber of Commerce v. Director General, 62 I. C. C. 412 (R., 263-273);

Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., 95 I. C. C. 244 (R., 285-288);

Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., 140 I. C. C. 171 (R., 306-307).

(e) The essential language of the finding made in the First Case is the same as that employed in the finding in the Third Case. The petitioner's asserted right to reparation depends entirely upon the latter, which must be construed as a finding of reasonableness if petitioner's suit is to have any basis whatsoever. But if the latter is construed as a finding of reasonableness, the finding in the First Case must be given an identical construction.

Traffic Bureau, Phoenix Chamber of Commerce v. Director General, 62 I. C. C. 412 (R., 273-275);

Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., 140 I. C. C. 171 (R., 307, 308, 314, 315).

(f) The Commission's determination whether a rate is reasonable is conclusive, if supported by substantial evidence, unless the Commission has acted in excess of its constitutional or statutory jurisdiction. Such a finding and order are not subject to collateral attack.

It is not contended that the Commission, in the *First Case,* was not proceeding strictly in accordance with the powers conferred upon it by law, or that its conclusion was not based upon substantial evidence. In short, it is not and has never been asserted that the findings and order in the *First Case* were invalid in any respect. They must therefore be accepted as valid, and as having conclusively established (as long as they continued without modification) the legal measure of rates which were just and reasonable, and in conformity with the requirements of the statute.

Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 271;

I. C. C. v. U. P. R. R. Co., 222 U. S. 541, 547;

A. T. & S. F. Ry. Co. v. United States, 234 U. S. 294, 311;
Virginian R. Co. v. United States, 272 U. S. 658, 665.

---

2. THE CIRCUIT COURT OF APPEALS CORRECTLY CONCLUDED THAT THE ACT DOES NOT CONFER UPON THE COMMISSION JURISDICTION TO AWARD REPARATION FOR THE COLLECTION OF RATES LAWFULLY PUBLISHED IN COMPLIANCE WITH THE COMMISSION'S PRIOR FORMAL FINDINGS AND ORDERS.

Petitioner's Specifications of Error Nos. 2 and 4 are addressed to the Circuit Court's conclusion that the Act does not confer jurisdiction upon the Commission to award reparation for the collection of rates published and maintained in conformity with a valid, continuing, effective finding and order of the Commission. That conclusion is expressed most directly in the following portions of the opinion:

> "The contention is that the Commission could revise its original findings as to what was in fact a reasonable rate because in the first instance it acted as a law-making body—a legislature—and in the second it acted in a judicial capacity—as a court. * * * What follows? Is it not true that a court is bound in its determination by the law? Consequently, if the court finds that a rate has been fixed by law, by the legislature, it must apply that law as a measure of right, and

award as excessive only such charges as exceed the rate fixed by law. The Transportation Act (sec. 16, subd. 1), delegating power to the Commission to award reparations, limits that power to parties 'entitled to an award of damages under the provisions of this chapter (act) *for a violation thereof.* * * *'. (Italics ours.) (See, also, Transportation Act, sec. 10, subd. 8.) Is the court (the Commission in its quasi-judicial capacity) to say that a carrier has no lawful right to collect a rate established by law (that fixed by the Commission acting in its quasi-legislative capacity), or, having collected it, to retain it? It is true that the original order is not res judicata, but its effect is quite as final, it is a legislative fiat, good, if constitutional, in all courts and at all times until changed by the legislature." (R., 451-452).

"When, however, in regularly pursuing its delegated power, the Commission establishes a specific rate as reasonable in fact, the legislative power has so definitely established the specific rate thus fixed as just and reasonable that there is no longer room for judicial decision as to what is a just and reasonable rate. Congress, through its agent, the Commission, has established the measure by which the reasonableness of the rate is to be judged. In considering an application for damages for charging unreasonable rates a court, or the Commission acting as such, must confine its inquiry to the other factors involved in an award of reparations, such as the amount of freight moved, the point of origin and of delivery, the

owner of the shipment, etc.; but if there is no excess charge there can be no award, for where the rate is one fixed by law it is not excessive in any legal sense." (R., 453-454).

The Court's conclusions upon this point are sustained by the following propositions and controlling authorities:

(a) **The Act confers jurisdiction upon the Commission to award reparation to a private party only when he is legally damaged by reason of a carrier's violation of the Act.**

News Syndicate Co. v. N. Y. C. R. Co., 275 U. S. 179, 187;

Interstate Commerce Act, Sections 8, 9, 16 (1) (49 U. S. Code 8, 9, 16 (1)).

Petitioner apparently agrees—at least, it does not oppose the proposition—that the Commission's power to award reparation is confined to those instances where it is shown that the asserted damage results from a carrier's violation of the Act.

(b) **The Commission, when it acts in a quasi-judicial capacity for the purpose of awarding reparation, must be bound, in the same manner as any other judicial tribunal, by the law and the facts as they existed at the time the asserted cause of action arose.**

Prentis v. A. C. L. R. Co., 211 U. S. 210, 226.

(c) The publication and assessment of a rate conforming to and complying with the Commission's specific order prescribing the reasonable maximum rate thereafter to be applied cannot be a violation of the Act, and therefore cannot give rise to legal damages.

Carriers are required, under pain of severe penalty, to comply with and obey orders of the Commission prescribing their rates (Interstate Commerce Act, Sect. 16, pars. 7, 8; 41 Stat. 492). If the Commission is empowered to award reparation for the collection of rates which it has prescribed, then we are faced with the extraordinary proposition that a carrier can be penalized, under the Act, for having done the very thing which it was compelled under heavy penalty to do. This Court has, however, held that no action against carriers for damages can be predicated upon the assessment and collection of rates authorized and approved by formal findings or orders of the Commission.

Keogh v. C. & N. W. Ry. Co., 260 U. S. 156.

While the *Keogh Case* did not involve the precise issue here presented, it did determine that there could be no legal damage, capable of recovery in an action at law, where the instrument by which the alleged injury was inflicted was the collection of the legal rate which had been approved and authorized by direct findings of the Commission.

Moreover, in a number of cases decided by state and federal courts, in which have been involved issues sub-

stantially identical with those presented in the instant case, the courts have unanimously declared and sustained the proposition that a regulatory body, authorized to prescribe rates to be charged by carriers subject to its jurisdiction, cannot award reparation for the collection of rates published and maintained in conformity with its valid decisions and orders. There is no reported decision holding to the contrary.

Winsor Coal Co. v. C. & A. R. Co., 52 Fed. 716;
M. K. & T. Ry. Co. v. Railroad Comm. of Tex., 3 S. W. (2d) 489; 13 S. W. (2d) 680;
Mathieson Alkali Works v. N. & W. Ry. Co., 147 Va. 426; 137 S. W. 608;
Miller Mill Co. v. L. & N. R. Co., 207 Ala. 253;
Young Co. v. Payne, 127 Miss. 48;
N. P. Ry. Co. v. Dept. Public Works, 136 Wash. 389;
T. & P. Ry. Co. v. Railroad Comm., 137 La. 1059;
Bonfils v. Public Utilities Comm., 67 Colo. 563.

Compare, also:

A. C. L. R. Co. v. Powe, ... U. S. ....., 75 L. ed. Adv. Ops. 721.

3. THE CIRCUIT COURT OF APPEALS HAS CORRECTLY CONCLUDED THAT IF THE ACT WERE TO BE CONSTRUED AS CONFERRING JURISDICTION UPON THE COMMISSION TO AWARD REPARATION AGAINST COMMISSION-MADE RATES, IT WOULD TO THAT EXTENT BE UNCONSTITUTIONAL AND VOID, IN THAT IT WOULD OPERATE TO DEPRIVE THE RESPONDENT CARRIERS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Petitioner's third assignment of error is apparently addressed to the Circuit Court's conclusion that the Act, *if it should be construed as conferring upon the Commission jurisdiction to award reparation under the circumstances here presented,* would to that extent be unconstitutional and void, in that respondents' property would be taken without the observance of the due process of law guaranteed by the Fifth Amendment. The Circuit Court has not held, as petitioner asserts, that the Act *is* unconstitutional because it confers that jurisdiction; on the contrary, the Court has construed the Act as *not* conferring such jurisdiction, thus avoiding any necessity of calling its validity into question under the Constitution. In so doing, the Circuit Court has followed controlling pronouncements of this Court.

Ann Arbor Co. v. United States, 281 U. S. 658, 669 (already cited);

Harriman v. Interstate Commerce Commission, 211 U. S. 407, 422.

The conclusion to which petitioner's third assignment seems to be directed is contained in the following portion of the opinion:

"Indeed, although the appellee insists that the fixing of rates as a basis of reparation for past shipments is a judicial or quasi-judicial act, it would be better, perhaps, for its position if the act were legislative, for a legislative body, unlike a court, can establish the law retroactively unless prevented by constitutional limitations. * * *

"If the second fixing or refixing of the rate by the Commission as a basis for reparations is legislative, the only limits upon a retroactive act, other than the Constitution, would be the limitations of the Transportation Act defining the powers delegated to the Commission. The only constitutional restriction upon the legislative power to retroactively reduce rates suggested by the appellant is the constitutional prohibition against the taking of property without due process of law. That is, it is argued, the Commission, having established a legal and lawful rate, the freight charges thus fixed, allowed and collected become the property of the carrier and cannot by a new retroactive law be arbitrarily taken away by legislative fiat. This position seems to be well taken." (R., 454-455).

This conclusion is sustained by the following propositions and controlling authorities:

(a) The Commission, in awarding reparation, exercises a quasi-judicial function; when it prescribes or approves a reasonable rate for the future it acts in a quasi-legislative capacity.

Baer Bros. v. D. & R. G. R. Co., 233 U. S. 479, 486;

L. & N. R. Co. v. Garrett, 231 U. S. 298, 305.

(b) The Commission's order in the First Case having been made in the exercise of its legislative power, was conclusive until it was modified by the Commission's subsequent order, since its validity was never questioned. Charges collected by the defendants under the rates authorized by and applied in conformity with that order therefore became property vested in conformity with existing law, of which they could not be deprived by retroactive findings and orders of the Commission.

The undisputed facts show that the carriers sold their transportation services at prices less than the maximum authorized by the Commission, and collected the authorized lawful rates. Upon completion of the services, such funds passed into their possession and ownership, and became their vested property. That property could not afterwards be lawfully taken from them, even though the rate might be changed, as to its *prospective* operation, by the same agency which first authorized it. Neither Congress, nor the Commission, nor any other federal agency subject to the limitations of the Fifth Amendment, could make a valid *retroactive* decree, taking from the respondents the property which they had duly acquired, in accordance with the law contemporaneously in effect.

Fletcher v. Peck, 6 Cranch (10 U. S.) 87, 135;
Calder v. Bull, 3 Dallas (3 U. S.) 385;
Hurtado v. California, 110 U. S. 516, 535;
Twining v. New Jersey, 211 U. S. 78, 101;
Blodgett v. Holden, 275 U. S. 142;
Untermyer v. Anderson, 276 U. S. 440.

It may be noted that most, if not all, of these authorities are cited by the Circuit Court (R., 455).

II.

WHILE THIS COURT HAS NEVER DIRECTLY DECIDED THE PRECISE QUESTION OF FEDERAL LAW HERE INVOLVED, IT HAS DONE SO INDIRECTLY IN A NUMBER OF CASES. THE CIRCUIT COURT'S DECISION IS SQUARELY IN ACCORD WITH THE CONTROLLING PRONOUNCEMENTS OF THIS COURT.

It may be conceded, as petitioner asserts, that the instant proceeding involves an important question of federal law. But it does not necessarily follow that this Court is required to review the Circuit Court's decision. The precise question presented, though not heretofore directly passed upon by this Court, has been indirectly involved in a number of cases; and in each of those cases this Court has indicated views which directly support the conclusions of the Circuit Court of Appeals. In short, the important question of federal law here presented has been settled by this Court, indirectly at least; and the Circuit Court's determination is squarely in accord with applicable decisions of this Court.

Among the decisions of this Court which indicate that there can be no right to reparation, arising from the collection by interstate carriers of a rate published and maintained pursuant to the express approval and authority, and indeed the formal order, of the Commission, are:

Keogh v. C. & N. W. Ry. Co., 260 U. S. 156 (already cited);

S. P. Co. v. Interstate Commerce Commission, 219 U. S. 433.

In the *Keogh Case,* this Court directly held that there could be no right of action for damages, predicated upon an asserted violation of the Sherman Anti-Trust Act, where it appeared that the alleged offense was the concerted publication and assessment, by several carriers, of rates approved, authorized or ordered by the Commission. This Court remarked that the provisions of the Anti-Trust Act and the Interstate Commerce Act, providing for the recovery of damages, were similar, in that no recovery could be had unless it was shown that the damages resulted from some unlawful act of the defendants; and concluded that since the act alleged to have caused injury to the claimant was in fact duly authorized by competent authority, it was not unlawful, and therefore could not give rise to legal damages. That is precisely the conclusion of the Circuit Court in the case at bar.

In

S. P. Co. v. Interstate Commerce Commission,
219 U. S. 433,

this Court, in passing upon the validity of an order of the Commission prescribing certain reduced rates for the future, said, at the conclusion of its opinion (219 U. S., at p. 452):

> "The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law, the

order of the Commission has spent its force, and therefore the question for decision is moot. * * * It is to be observed that clearly the question is without merit *in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined;* and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy." (Emphasis supplied.)

Particular attention is called to the italicized portion of the foregoing quotation. That expression can only be understood to mean that if the legality of the order were affirmatively determined, there could be no possible liability for reparation to which the railroads might be subjected: i. e., their compliance with a legal and valid order of the Commission could not create any right to reparation for the assessment of the charges thus established.

Petitioner asserts, however (Petition, pp. 18-19), that the decision of the Circuit Court is *probably* in conflict with this Court's decision in:

Reagan v. Farmers Loan & Trust Co. (1894), 154 U. S. 362.

It requires but brief analysis of the *Reagan Case* to demonstrate that the decision in the case at bar does not conflict therewith to the slightest degree. In the

first place, the *Reagan Case* involved a suit by representatives of a railroad company, brought for the purpose of enjoining, by decree of a federal court, the enforcement of certain rates prescribed by the Texas Railroad Commission for application upon Texas intrastate traffic. The basis of the suit was that the intrastate rates were so unjustly and unreasonably low as to confiscate the carrier's property, in contravention of the Fourteenth Amendment. No question was raised as to the powers, if any, of the Texas Commission to award reparation. Rates *for the future only* were involved. In the *second* place, this Court could not possibly have considered, even for purposes of illustration, whether the Interstate Commerce Commission possessed any power to award reparation, particularly as to rates which it had previously prescribed. The litigation arose in 1891 and 1892, and the decision was rendered in 1894. *At that time the Interstate Commerce Act did not confer upon the Commission power either to prescribe reasonable rates for the future or to award reparation.* Jurisdiction in those respects was not acquired until the passage of the Hepburn Amendment, in 1906 (34 Stat. 584). In the *third* place, the expressions in the opinion in the *Reagan Case,* upon which petitioner relies, if properly studied and construed in conjunction with the remainder of the opinion, support the decision of the Circuit Court in the instant case, and deny the jurisdiction which petitioner seeks to assert on the part of the Commission. *Finally,* as the Circuit Court

takes pains to point out in its opinion (R., 458-461), these expressions in the *Reagan Case*, even if given the meaning for which petitioner contends, are directly in conflict with later pronouncements of this court; e. g.;

T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 448;

Mitchell Coal Co. v. Pa. Ry. Co., 230 U. S. 247, 259;

Skinner & Eddy Co. v. United States, 249 U. S. 557, 562;

Philips v. Grand Trunk Western Ry. Co., 236 U. S. 662, 665.

The Circuit Court of Appeals has properly characterized the expressions in the *Reagan Case*, if they are to be construed as in any way relating to the reparation power of the Commission, as *dicta*, and therefore of no controlling force. Of course, pronouncements of this Court, even though by way of *dicta*, are entitled to the respect, but this Court has frequently stated that its *dicta cannot be regarded as controlling, when cited upon an issue which was not, and in the very nature of things could not have been, presented to or even considered by the Court.* See

Webster v. Fall, 266 U. S. 507;

Wolff Co. v. Industrial Court, 267 U. S. 552.

The decision of the Circuit Court in the case at bar is not in any way in conflict with any controlling decision of this Court; on the contrary, it is squarely

in accord with and directly supported by all of the relevant pronouncements of the Court.

III.

THE DECISION OF THE CIRCUIT COURT DOES NOT DENY PETITIONER ANY PROPERTY RIGHT, OR ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

It is asserted (Petition, pp. 17-18) that the Circuit Court's decision, if permitted to stand, will operate to deprive petitioner of its property without due process of law, and to deny to it property rights to which it is entitled under the Interstate Commerce Act. Petitioner argues that it is entitled, as a right of property, to have its shipments in interstate commerce transported at reasonable rates, and that the Act creates the means whereby this asserted property right may be protected, and the charging of unreasonable rates prevented. From this premise it is argued that since the Commission, in the *Third Case,* found that unreasonable rates had been charged upon petitioner's shipments, affirmance of the decision, and consequent denial of the reparation which the Commission undertook to award, will operate to deny to petitioner its right to have its shipments transported at reasonable rates.

It may be conceded that petitioner is entitled, as of right, to have its shipments transported at reasonable rates; but it does not follow that affirmance of

the decision of the Circuit Court will cause that right to be taken away. The rates charged upon petitioner's shipments were admittedly maintained and applied in conformity with a valid and continuing decision and order of the Commission which was in effect, without modification, at the time the shipments moved. By that decision and order the Commission prescribed the reasonable rates to be charged. The carriers' compliance with the Commission's order caused the rates thus established to be just and reasonable, since they were maintained in conformity with an outstanding valid determination made by the only tribunal having ultimate jurisdiction in the premises. The Circuit Court's decision declares simply that the carriers' obedience to the Commission's valid order, establishing the level of their rates, constituted a full discharge of the obligation imposed by the Act to maintain just and reasonable rates, and gave to the shipper every protection against the imposition of unreasonable charges to which it was entitled by the statute.

It is contended, however, that the Commission's finding in the *Third Case,* to the effect that the rates thus established and maintained in compliance with the prior order were in fact unreasonable, is conclusive, and that no evidence to contradict that finding was introduced by respondents. That contention is wholly without foundation. In the *first* place, the finding is not conclusive, for it was made by the Commission in the attempted exercise of a jurisdiction

which it does not possess. To assert that the finding is conclusive simply begs the question, for it assumes that the Commission possesses valid jurisdiction as to the very subject-matter with respect to which its jurisdiction is challenged. Of course, it is elementary that a finding or decision by a tribunal, upon a subject not within its jurisdiction, is utterly void and of no effect whatsoever.

Valley v. No. F. & M. Ins. Co., 254 U. S. 348;
Scott v. McNeil, 154 U. S. 34.

In the *second* place, conclusive evidence to contradict the finding upon which petitioner relies was introduced by respondents, i. e., the opinion and order in the *First Case* (R., 263-275) which constitutes a part of the agreed statement of facts; and to the showing in said agreed statement (R., 257-258) establishing that respondents published and maintained, and applied to petitioner's shipments, rates in compliance with the outstanding valid and effective order of the Commission in the *First Case,* in which the reasonable maximum rate to be applied to the transportation service was prescribed. This is not disputed or denied.

The record conclusively shows, and the Circuit Court of Appeals properly decided, that the rates charged upon petitioner's shipments were just and reasonable, in conformity with the requirements of the Act, and of the Commission's outstanding valid order, in effect at the time the shipments moved. It follows that petitioner was accorded every right of

property which it now asserts, and that the decision of the Circuit Court does not operate to deprive petitioner of its guaranteed right, under the Act, to have its shipments transported at just and reasonable rates.

IV.

WHILE THE ISSUE INVOLVED IN THE CASE AT BAR IS OF CONSIDERABLE IMPORTANCE, THERE IS NO NECESSITY FOR ANY FURTHER PRONOUNCEMENT BY THIS COURT WITH RESPECT THERETO.

At pages 13 to 16 of the petition, petitioner emphasizes its assertion that the instant case involves an important question of federal law, which has never been settled by this Court. We have already remarked that this assertion is inconsistent with petitioner's statement (Petition, p. 18) that the decision of the lower Court is *probably* in conflict with a prior decision of this Court. We agree with petitioner that the question involved is of some importance; but, as we have shown, it has already been decided, adversely to petitioner, in prior controlling decisions of this Court.

Petitioner refers, however, to decisions of the Commission in which that tribunal has maintained the opinion that it possesses jurisdiction to award reparation against rates which it has prescribed. Obviously these decisions of the Commission cannot be accorded authoritative weight in the premises. Conclusions of

the Commission upon matters of law, and particularly upon the scope of its own jurisdiction, are in no sense conclusive, or even controlling, in the courts.

United States v. Mo. Pac. R. R. Co., 278 U. S. 269.

Moreover, the assumption that the Commission has correctly decided the issue of its jurisdiction simply begs the question, for it assumes the very answer to the essential issue presented.

It may be noted that petitioner states (Petition, p. 16) that the Commission maintains that it possesses jurisdiction to award reparation to shippers, if *in fact* they have paid an unreasonable rate. That statement is misleading, in that it misrepresents the essential issue. The fundamental question is whether the Commission possesses jurisdiction to award reparation *when it appears, without dispute, that the rates published and collected were maintained and applied in conformity with the express direction, and the formal valid order, of the Commission,* such order having been in effect, without modification, at the time the shipments were transported and the charges collected. In other words, the essential issue is not whether the Commission possesses general jurisdiction to award reparation against unreasonable carrier-made rates, but whether it may validly make a retroactive order, which repudiates a prior valid decision, and thus penalize, by means of reparation awards, carriers who have in good faith complied with its prior decision, and collected charges which it has directly authorized

or prescribed. The Circuit Court has properly held that the Commission possesses no such power; that the Congress, in enacting the statute, did not confer upon the Commission jurisdiction to impose a penalty upon interstate carriers for doing the very thing which, under the law and the orders of the Commission, they were authorized or required to do.

CONCLUSION.

It is submitted that petitioner has failed entirely to show that the decision of the Circuit Court of Appeals is erroneous in any respect, or that any ground whatsoever exists requiring this Court to exercise its power of review. The petition should be summarily denied.

Respectfully submitted,

A. B. BAKER,
L. B. WHITNEY,
L. H. CHALMERS,
H. M. FENNEMORE,
THOMAS G. NAIRN,
Phoenix, Arizona,
E. W. CAMP,
Los Angeles, California,
JAMES E. LYONS,
San Francisco, California.
Attorneys for Respondents.

R. S. OUTLAW,
GERALD E. DUFFY,
BURTON MASON,
Of Counsel.